Supreme Court, U.S.
FILED

97 766 OCT 31 1997

OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JORDAN B. CHERRICK
ARMSTRONG, TEASDALE, SCHLAFLY & DAVIS
One Metropolitan Sq., 26th Flr.
St. Louis, Missouri 63102
(314) 621-5070

R. CHRIS HARVEY
JAMES K. PEDEN, III
ROSS T. ROBINSON
STRASBURGER & PRICE, LLP
901 Main Street, Ste. 4300
Dallas, Texas 75202
(214) 651-4300

PAUL T. CAPPUCCIO
Counsel of Record
RICHARD A. CORDRAY
JAY P. LEFKOWITZ
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington D.C. 20005
(202) 879-5000

TIMOTHY M. BURKE
MANLEY, BURKE, LIPTON & COOK
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Attorneys for Petitioner

55 pp

QUESTIONS PRESENTED

1. Whether a circuit court of appeals is jurisdictionally barred from hearing an appeal from a trial court order compelling the disclosure of privileged communications, or whether such an appeal properly comes within the "collateral order" doctrine laid down by the Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

2. Whether a circuit court of appeals is jurisdictionally barred from reviewing a petition for mandamus taken from a trial court order compelling the disclosure of privileged communications because a party is obliged to disobey the order and go into contempt before it can seek any review on the merits?

PARTIES TO THE PROCEEDING

Petitioner General Motors Corporation is a defendant in this case and was both the appellant below and the real party in interest in the separate proceeding on its petition for mandamus. Karol R. Vernon and Vernbrook, Inc., were also named as defendants. Pursuant to Supreme Court Rule 29.6, General Motors advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 21, 1996:

Asset Leasing GmbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH

Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co., Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in the following entities:

American Mobile Satellite Corp.
Detroit Diesel Corp.
Fiem Sung San (India) Limited
GMFanuc Robotics Corp.
Isuzu Motors Limited
Motor Enterprises, Inc.
New United Manufacturing, Inc.
Nippon Avionics Co., Limited
PanAmSat Corp.
Suzuki Motor Corp.

Valorie Lynn Grear and her husband, Paul C. Nordberg, are the plaintiffs in this case, having brought this suit in their individual capacities, and were appellees and respondents

below. The Honorable Julia Smith Gibbons of the United States District Court for the Western District of Tennessee, who serves as the trial judge in this case, was named as a respondent in the petition for mandamus filed below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. The Task Force Memorandum 3

B. The Trial Court Proceedings 4

C. The Trial Court Rulings 5

D. The Procedure Followed by the Court of Appeals 6

REASONS FOR GRANTING THE WRIT 6

I. THE DECISION BELOW RAISES IMPORTANT ISSUES OF APPELLATE JURISDICTION ON WHICH THE CIRCUITS ARE IN CONFLICT 8

II. THE SIXTH CIRCUIT'S APPROACH ERECTS UNDULY SEVERE HURDLES TO PROTECTING THE ATTORNEY-CLIENT PRIVILEGE 12

TABLE OF CONTENTS
(continued)

PAGE

A. Effective Elimination of Mandamus Review 12

B. The Fatal Flaw in the Sixth Circuit's Analysis: A Party Cannot Simply Opt for Criminal Contempt ... 14

C. Forcing Parties into Contempt is Unsatisfactory 15

III. THIS PETITION ADDRESSES IMPORTANT ISSUES OF JUDICIAL ADMINISTRATION THAT DIRECTLY AFFECT EVERY CIRCUIT COURT AND DISTRICT COURT NATIONWIDE 17

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 15
Admiral Ins. Co. v. U.S. Dist. Ct.,
881 F.2d 1486 (9th Cir. 1989) ..... *passim*
Boughton v. Cotter Corp.,
10 F.3d 746 (10th Cir. 1993) 10
Chase Manhattan Bank, N.A. v. Turner & Newall, PLC,
964 F.2d 159 (2d Cir. 1992) 7, 10, 12
Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) ..... i, 9, 11
Coleman v. American Broad. Co.,
106 F.R.D. 201 (D.D.C. 1985) 17
Ex parte Young,
209 U.S. 123 (1908) 17
Fox v. Capital Co.,
299 U.S. 105 (1936) 14
Grear v. General Motors Corp.,
No. 97-5968 (6th Cir. Sept. 17, 1997) ..... *passim*
Harper & Row Publishers, Inc. v. Decker,
423 F.2d 487 (7th Cir. 1970),
aff'd by equally divided Court,
400 U.S. 348 (1971) 7, 11, 17
In re Bieter Co.,
16 F.3d 929 (8th Cir. 1994). 7, 10, 11
In re Burlington Northern, Inc.,
822 F.2d 518 (5th Cir. 1987) 7, 10
In re Ford Motor Co.,
110 F.3d 954 (3d Cir. 1997) ..... *passim*
In re General Motors Corp.,
No. 97-5989 (6th Cir. Sept. 17, 1997) ..... *passim*

TABLE OF AUTHORITIES
(continued)

PAGE

In re Regents of Univ. of Cal.,
101 F.3d 1386 (Fed. Cir. 1996),
cert. denied, 117 S. Ct. 1484 (1997) 7, 10
Jenkins v. Weinshienk,
670 F.2d 915 (10th Cir. 1982) 7, 10, 12
La Buy v. Howes Leather Co.,
352 U.S. 249 (1957) 13
Laird v. Tatum,
408 U.S. 1 (1972) 16
Lamar Fin. Corp. v. Adams,
918 F.2d 564 (5th Cir. 1990) 14
Oklahoma Operating Co. v. Love,
252 U.S. 331 (1920) 16
O'Shea v. Littleton,
414 U.S. 488 (1974) 16
R.R. Donnelley & Sons Co. v. F.T.C.,
931 F.2d 430 (7th Cir. 1991) 14
Rowley v. McMillan,
502 F.2d 1326 (4th Cir. 1974) 7, 11, 12
Schlagenhauf v. Holder,
379 U.S. 104 (1964) 13
Texaco, Inc. v. Louisiana Land & Exploration Co.,
995 F.2d 43 (5th Cir. 1993) 10
United States v. Hemphill,
369 F.2d 539 (4th Cir. 1966) 7, 16
Upjohn Co. v. United States,
449 U.S. 383 (1981) 2, 9, 17
Will v. United States,
389 U.S. 90 (1967) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, and Regulations

Fed. R. App. P. 41(b) 6
Fed. R. Civ. P. 26(b)(5) 13
Sup. Ct. R. 29.6 ii
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 ..... 3, 7
28 U.S.C. § 1651 ..... 3, 7

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,

Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner respectfully petitions for a writ of *certiorari* to review the orders entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

The Sixth Circuit's twin rulings -- which held that a court of appeals lacks jurisdiction to entertain either an interlocutory appeal or a petition for writ of mandamus challenging a trial court order compelling the disclosure of privileged communications -- create a three-way circuit split and impose an undue burden on litigants seeking to protect privileged documents. Every other circuit to have addressed the issue has

concluded that parties have one or both of these avenues of review available to challenge a trial court's compelled disclosure of documents or other communications protected by the attorney-client privilege and work product doctrine. By requiring litigants to disobey orders compelling disclosure of privileged documents and go into contempt before seeking appellate review, the Sixth Circuit has effectively ordered district court bailiffs to guard the door to the court of appeals. This draconian rule -- which requires litigants to brave the threat of sweeping discovery sanctions, substantial fines, and permanent harm to reputation, before they would be authorized even to seek appellate review -- would all but eliminate judicial protection of "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

OPINIONS BELOW

The District Court's order compelling the disclosure of privileged communications is unreported and is reprinted in the Appendix to this petition ("Pet. App.") at 10a. It affirmed a magistrate's order to the same effect that is reprinted at Pet. App. 1a-9a. In order to obtain review of the disclosure order, General Motors filed a notice of appeal and also petitioned for mandamus. The Court of Appeals initially granted a temporary stay of the disclosure order, *see id.* 12a, but later issued two related orders resolving the matter, from which this petition is taken. The first order dismissed the appeal, which was found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 14a-15a. The second order denied the petition for mandamus, which was also found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 16a-17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered the orders under review here on September 17, 1997. *See* Pet. App. 14a; *see also id.* 16a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

28 U.S.C. § 1651(d) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

A. The Task Force Memorandum.

The document whose privileged character is at issue between the parties here -- the so-called "Task Force Memorandum" -- is a ten-page confidential memorandum written in April 1990 by two General Motors in-house lawyers, Gary P. Toth and Douglas E. Brown, and addressed to a third in-house lawyer, James A. Durkin. At that time, Mr. Durkin was legal counsel to the senior committee that was responsible for advising the Corporation on technical issues. Mr. Toth was a principal legal advisor to General Motors' Automatic Restraint Task Force ("the Task Force"). The Task Force, which consisted of about a dozen engineers, was charged with providing the General Motors legal staff with information and engineering evaluations on the technical issues raised in connection with anticipated litigation involving General Motors' door-mounted restraint systems. *See* Pet. App. 24a-25a (Durkin Affidavit).

Early in 1990, Mr. Durkin asked Messrs. Toth and Brown to prepare a memorandum analyzing available technical information related to the use of automatic belt systems. They

responded to this request by producing the confidential Task Force Memorandum, with the anticipation that it would remain confidential and be used solely to provide legal advice and defend litigation claims against General Motors. Mr. Durkin forwarded the memorandum to a select few individuals at General Motors on a need-to-know basis, as analytical support for the legal advice he had provided them.

In order to remove any doubt about the indisputably privileged nature of the Task Force Memorandum, General Motors has provided it for *in camera* review by this Court, by lodging it as a separate sealed appendix accompanying this petition. *See* Appendix A (filed under seal).

B. The Trial Court Proceedings.

This dispute over the privileged character of the Task Force Memorandum arises from a products liability action. Plaintiff Valorie Grear sustained serious injuries as the result of a 1995 accident in her Buick Skylark. She and her husband filed this action against General Motors, alleging that the car's door-mounted passive restraint and door latch systems were defectively designed.

On February 10, 1997, plaintiffs served on General Motors a request to produce all documents relating to the meetings of and findings, conclusions, and studies of the Task Force. In addition, plaintiffs served on General Motors a First Set of Interrogatories, which requested, *inter alia*, that General Motors produce a privilege log for all documents that it had not produced in response to plaintiffs' requests. General Motors objected to this request on grounds of attorney-client privilege and the work product doctrine. In response to plaintiffs' request for a privilege log, General Motors stated that it would either provide a privilege log for the Task Force documents or provide them to the court for *in camera* inspection.

Dissatisfied with General Motors' responses -- including its assurance that it would produce either a privilege log or the Task Force documents for *in camera* review -- the plaintiffs moved to compel production of those documents. General

Motors immediately sought a protective order, explaining that it had declined to produce these documents -- including the Task Force Memorandum -- because they are privileged.

On May 22, 1997, General Motors submitted the privileged Task Force documents to the Court for *in camera* inspection, and withdrew the rest of its privilege claims. The next day, the parties discussed these documents at a settlement conference before the Magistrate Judge. Following that meeting, the Magistrate Judge ordered General Motors to produce a privilege log identifying the Task Force documents that remained undisclosed. Within a week, General Motors duly produced the requested privilege log, which listed and described, *inter alia*, the Task Force Memorandum. At the same time, General Motors submitted the privileged documents (including the Task Force Memorandum) under seal for *in camera* review.

C. The Trial Court Rulings.

In an Order dated July 7, 1997, the Magistrate Judge granted plaintiffs' Motion to Compel and denied General Motors' Motion for a Protective Order. *See* Pet. App. 9a. Significantly, the Magistrate Judge did *not* find that any of the then-undisclosed Task Force documents were not privileged; indeed, the Magistrate Judge refused even to review the privileged documents *in camera*. Instead, the Magistrate Judge granted the Motion to Compel because she determined that General Motors had "waived its asserted privileges . . . for failure to properly and timely describe the documents," even though General Motors has clearly and consistently reiterated its position that this specific document is protected by the attorney-client privilege. *Id.* 4a. The Magistrate Judge directed General Motors to produce the Task Force documents by July 15, 1997.

After granting an initial stay of the Magistrate Judge's ruling, the District Court ultimately affirmed the Magistrate Judge's order, stating only that "[t]he magistrate judge's ruling is not clearly erroneous or contrary to law." Pet. App. 10a. General Motors immediately appealed, petitioned for a writ of

mandamus, and moved for a stay pending review by the Sixth Circuit. The District Court denied the stay, but extended the deadline for producing the Task Force Memorandum to August 15, 1997. *Id.* 11a.

D. The Procedure Followed by the Court of Appeals.

On August 13, 1997, the Sixth Circuit issued an order that temporarily stayed the trial court order pending its disposition of the appeal and petition for mandamus filed by General Motors. Pet. App. 12a-13a.

In two orders entered on September 17, 1997, the Sixth Circuit: (1) granted plaintiffs' motion to dismiss; (2) denied General Motors' petition for writ of mandamus; and (3) dissolved the temporary stay. In denying both the appeal and the mandamus petition, the Sixth Circuit did not rule on the merits of either submission. Instead, it held that it lacked jurisdiction to entertain *either* an interlocutory appeal *or* a request for mandamus relief. In particular, the Sixth Circuit expressly rejected the recent decision by the Third Circuit in *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), which had held that *both* avenues of relief are properly available to a party seeking to resist disclosure of documents protected by the attorney-client privilege, bluntly stating that "we decline to adopt the reasoning of that case." Pet. App. 15a. The Sixth Circuit held that "[a]lthough a direct appeal following final judgment is an inadequate remedy, GM can obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* 16a-17a; *see also id.* 15a.

Upon receipt of these orders, General Motors moved in the Sixth Circuit for a stay of the mandate pursuant to Fed. R. App. P. 41(b), seeking temporary relief pending review by this Court. On October 3, 1997, the Sixth Circuit granted the motion for stay and gave General Motors time in which to prepare and file this petition for *certiorari*. Pet. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

This petition cleanly presents a basic procedural issue of great importance to judicial administration in the federal courts,

on which there is a clear and irreconcilable three-way split among the circuit courts of appeals. The question presented is what mechanism shall be available to litigants in the federal courts to seek immediate relief from an order requiring the disclosure of documents that are protected by the attorney-client privilege. The Third Circuit has recently ruled that a party may take an interlocutory appeal in these circumstances under 28 U.S.C. § 1291, and that mandamus relief is also available pursuant to 28 U.S.C. § 1651 as an alternative means of obtaining immediate review. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

In contrast, most courts do not permit an interlocutory appeal in those circumstances, but do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1484 (1997); *In re Bieter Co.*, 16 F.3d 929, 931 (8th Cir. 1994); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490-92 (9th Cir. 1989); *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

The Sixth Circuit, however, has now imposed a far more draconian rule, holding that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief -- indeed, that both avenues of relief are *barred* on jurisdictional grounds. *See* Pet. App.15a; *see also id.* 16a-17a. Instead, the Sixth Circuit has held that in order to obtain immediate review, a party must go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions. Other circuit courts have squarely rejected this position, holding that forcing a party to engage in contumacious conduct is undesirable and creates the kind of irreparable harm that justifies immediate review on mandamus. *See, e.g., United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir.

1966). Courts have also noted that sanctions imposed against a party are not subject to immediate appeal unless the trial court chooses to proceed by way of criminal contempt, rather than through civil coercive contempt or by imposing some form of discovery sanctions. *See, e.g., Admiral Ins. Co.*, 881 F.2d at 1490-92. Those courts have thus recognized that forcing a party to disobey the trial court's order and submit to sanctions offers no assurance that the party can avoid irreparable harm by pursuing an immediate appeal.

This three-way split among the circuit courts on an issue so basic to judicial administration and so critical to the preservation of the legally sacrosanct attorney-client privilege warrants review on the merits in this case.

I. THE DECISION BELOW RAISES IMPORTANT ISSUES OF APPELLATE JURISDICTION ON WHICH THE CIRCUITS ARE IN CONFLICT.

Whether a party to litigation has available some procedural avenue by which it can challenge an erroneous trial court order requiring disclosure of privileged communications is self-evidently an important issue of judicial administration. This issue arises frequently, and can affect almost any civil or criminal case filed in federal court. A circuit conflict on such an essential and ubiquitous issue demands immediate review by this Court, if for no other reason than simply to lay down a clear rule that can be applied uniformly by all of the lower federal courts and followed clearly by litigants. As this petition demonstrates, this procedural issue has generated a clear and irreconcilable three-way split among the circuit courts.

The Third Circuit has recently ruled that an appellate court has jurisdiction to review a party's interlocutory appeal in these circumstances, and that mandamus relief would also be available in the alternative. *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). In a scholarly opinion by Judge Becker, the Court of Appeals undertook a careful review of the jurisdictional issues surrounding the possibility of an interlocutory appeal. After a close examination of the three prongs of the "collateral order" doctrine laid down by this

Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the court concluded that discovery orders compelling disclosure of privileged communications are subject to immediate appeal because they: (i) conclusively determine the disputed issue; (ii) resolve an important issue that is separate from the merits; and (iii) are effectively unreviewable on appeal from a final judgment. *See In re Ford Motor Co.*, 110 F.3d at 957-64.

The Third Circuit's holding that discovery orders compelling the disclosure of privileged communications are immediately appealable rests on a compelling analysis of the *Cohen* "collateral order" doctrine. As the court explained, the first and third prongs of the doctrine are obviously met, for the order "conclusively determines the disputed issue," *Id.* at 958, and in terms of protecting privileged communications from disclosure, the party is "irremediably disadvantaged by erroneous disclosure" because "the cat is already out of the bag," *id.* at 963. These conclusions are indisputable.

With respect to the second prong of the *Cohen* doctrine, the Third Circuit also was correct in holding that the issue of compelled disclosure of privileged communications is both separate from the merits of the underlying case and important enough to warrant immediate review. *Id.* at 958-62. On the issue of importance, in particular, the court held that "because of the imperative of preventing impairment of some institutionally significant status or relationship [here, the attorney-client relation], the danger of denying justice by reason of delay in appellate adjudication outweighed the inefficiencies flowing from interlocutory appeal." *Id.* at 960. The court so concluded after weighing the importance of the attorney-client privilege, which it recognized is "at the heart of the adversary system," and indeed "is one of the pillars that supports the edifice that is our adversary system." *Id.* at 961-62. The court's analysis thus mirrors this Court's own statements about the sacrosanct character of the privilege, which ensures the "observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389.

In addition, the Third Circuit went on to emphasize that even "if we did not have appellate jurisdiction, we would have mandamus jurisdiction to review" such orders. *In re Ford Motor Co.*, 110 F.3d at 962. In reaching this conclusion, the court rejected the practicality of later review of this category of trial court orders, holding that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material." *Id.* at 964. (It bears emphasis here that this statement by the court speaks to the efficacy *both* of immediate appellate review *and* discretionary mandamus review.) In the end, the court decided that it would be preferable to review such orders on direct appeal under the "collateral order" doctrine because mandamus review is more limited, and affords "less opportunity to provide guidance for future cases." *Id.* But under the Third Circuit's approach, a party may seek immediate review of such orders by utilizing either mechanism.

In contrast, most courts have not permitted an interlocutory appeal in those circumstances. *See, e.g., Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 43-44 & n.4 (5th Cir. 1993); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993). Yet those same courts do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Burlington Northern*, 822 F.2d at 522 (Fifth Circuit holds that mandamus is appropriate to protect claims of privilege); *Jenkins*, 670 F.2d at 917 (Tenth Circuit holds the same). Virtually every other circuit court likewise allows mandamus review: the Federal Circuit, *see, e.g., In re Regents of Univ. of Cal.*, 101 F.3d at 1387 ("writ of mandamus may be sought to prevent the wrongful exposure of privileged communications"); the Eighth Circuit, *see, e.g., In re Bieter Co.*, 16 F.3d at 931-32 (mandamus authorized because attorney-client privilege "has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy"); the Second Circuit, *see, e.g., Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because later appeal is an inadequate remedy to protect valid claims of privilege); the Ninth Circuit,

see, e.g., Admiral Ins. Co., 881 F.2d at 1490-92 (same); the Fourth Circuit, *see, e.g., Rowley*, 502 F.2d at 1335 (mandamus is appropriate to protect claim of privilege because appeal from either a final judgment or a contempt citation would be inadequate); and the Seventh Circuit, *see, e.g., Harper & Row*, 423 F.2d at 492 (appellate review after disclosure of attorney-client privileged information is inadequate and mandamus is proper).

This great weight of authority reflects the view, embraced by the vast majority of lower federal courts, that a mechanism must be kept available to permit some form of immediate review of trial court orders requiring the disclosure of privileged communications. Accordingly, even if the Third Circuit's conclusions on the applicability of the *Cohen* doctrine were judged to be incorrect for some reason, its alternative holding that mandamus review is available in these circumstances is surely correct. This holding is in agreement with every other circuit court that has considered the issue -- except for the Sixth Circuit.

The Sixth Circuit has now imposed a rigid rule that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief. *See* Pet. App. 14a-15a; *see also id.* 16a-17a. Instead, a party will be forced to go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions in order to vindicate its claim of privilege. *See id.* 15a; *see also id.* 16a-17a. Indeed, the Sixth Circuit has held that in this situation it has jurisdiction to consider *neither* an appeal *nor* a petition for mandamus -- an approach that disagrees with the position taken by every other circuit court of appeals.

Thus, the Sixth Circuit has simply rejected the analysis that undergirds the overwhelming body of precedent from the other circuit courts. Once again, the principal foundation for all of those other decisions is the inadequacy of alternative remedies, such as appeal after a final judgment or possible (though not certain) appeal from any imposition of contempt sanctions. *See, e.g., In re Bieter Co.*, 16 F.3d at 931 (mandamus review

appropriate due to "inadequacy of later review as a remedy"); *Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because "the privilege will be lost in the particular case if review must await a final judgment"); *Admiral Ins. Co.*, 881 F.2d at 1490-92 (granting mandamus relief because irreparable harm can result from forced disclosure of privileged material and civil contempt sanctions are not subject to immediate appeal); *Jenkins*, 670 F.2d at 917 (where privileged information is ordered to be disclosed, "appeal after a final decision is an inadequate remedy; in these circumstances, an appellate court may exercise its mandamus power"); *Rowley*, 502 F.2d at 1335 (mandamus is appropriate where a party's only other avenue for review of an order compelling disclosure of privileged information is to appeal from entry of a contempt citation). The Sixth Circuit's position, and the essential legal analysis upon which it rests, is simply irreconcilable with this overwhelming body of decisions by the other courts of appeals.

This three-way split among the circuit courts on an issue so basic to federal litigation and to preservation of the legally sacred attorney-client privilege is untenable as a matter of sound judicial administration. The issue is cleanly presented in this case, and review is warranted to resolve the conflict and lay down clear guidance for the lower federal trial courts and appellate courts.

II. THE SIXTH CIRCUIT'S APPROACH ERECTS UNDULY SEVERE HURDLES TO PROTECTING THE ATTORNEY-CLIENT PRIVILEGE.

A. Effective Elimination of Mandamus Review.

The uniquely oppressive approach embraced by the Sixth Circuit poses severe obstacles to appellate review of orders that threaten the vital interests protected by the longstanding doctrine of attorney-client privilege. In particular, the Sixth Circuit's approach would eliminate direct mandamus review as a necessary tool that is available to protect the attorney-client privilege. It thus clashes with this Court's decisions, which have stressed that mandamus review provides a logical method -- and at times an essential method -- by which to supervise

important issues concerning the administration of justice in the lower courts. *See, e.g., Will v. United States*, 389 U.S. 90, 107 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). To the extent that the Court has cautioned that mandamus should not be used as "a substitute for an appeal," *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), this caveat is amply addressed by limiting discretionary review in mandamus only to important questions of law, where guidance would be especially useful to the administration of justice in the lower courts, and as an escape hatch to the rigors of the finality rule, *id.* at 110-112.

The Sixth Circuit, however, has now held that even the mere possibility of such mandamus review *is jurisdictionally barred* and that a party instead must flout trial court orders and incur contempt sanctions before review can be sought to vindicate a valid claim of attorney-client privilege. *See* Pet. App. 15a; *see also id.* 16a-17a. By placing the unavailability of mandamus review on jurisdictional grounds, the Sixth Circuit's approach would clearly circumscribe the necessary use of the writ and indeed would effectively eliminate it as an option for courts and litigants in these circumstances.

Moreover, the Sixth Circuit's erroneous conclusion that it is barred on jurisdictional grounds from *even considering* whether to grant mandamus relief is particularly troublesome in this case, given the substantial importance of the underlying substantive issues raised in General Motors' mandamus petition. The District Court's order compelling the disclosure of privileged communications raises unsettled questions about the extent to which an extra-textual requirement to create a privilege log can properly be imported into Rule 26 of the Federal Rules of Civil Procedure. On its face, the Rule contains no such rigid requirement; instead, it merely requires a party raising a privilege objection to "make the claim expressly" and to "describe the nature of the documents" sufficiently to "enable other parties to assess the applicability of the privilege." *See* Fed. R. Civ. P. 26(b)(5). On the facts of this case, it is plain that General Motors complied with the absolute letter and spirit of this Rule; yet the Sixth Circuit has

erected unduly severe hurdles to parties like General Motors who simply seek to vindicate the legitimate claims of privilege traditionally afforded them.

B. The Fatal Flaw in the Sixth Circuit's Analysis: A Party Cannot Simply Opt for Criminal Contempt.

Even on its own terms, the Sixth Circuit's approach is inherently flawed. The Court of Appeals recognized that where the sanctity of privileged communications is at stake, "a direct appeal following final judgment is an inadequate remedy." Pet. App. 16a-17a. Nonetheless, it held that litigants are jurisdictionally barred from obtaining immediate review of such orders either by appeal or by mandamus, and must instead "obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* This prescription, however, overlooks the fact that even if a party were to follow this suggestion and deliberately disobey a discovery order requiring it to disclose privileged communications, the trial court may decide to proceed by way of coercive civil contempt or by imposing discovery sanctions, neither of which can be appealed by a party until a final judgment has been entered. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (party may not take an immediate appeal from civil contempt sanctions); *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990) (same); *Admiral Ins. Co.*, 881 F.2d at 1491 (same); *R.R. Donnelley & Sons Co. v. F.T.C.*, 931 F.2d 430, 431 (7th Cir. 1991) (discovery sanctions not appealable until after final judgment).

Thus, even on its own terms, the Sixth Circuit's approach provides no assurance that a party will be able to seek to vindicate its lawful privileges in any meaningful way, even after it has been forced to assume an unappetizing and unwelcome posture of judicial intransigence. If a party is obliged to follow the rule now embraced by the Sixth Circuit, it will be barred from obtaining any immediate review of a trial court order compelling the disclosure of privileged communications until it first disobeys that order and risks being held in contempt. If, at that juncture, the trial court decides to

respond to this flouting of its order by imposing civil contempt sanctions -- such as daily fines or continued imprisonment until the party submits to these coercive measures and discloses the privileged communications -- the intransigent party cannot obtain any immediate review of these sanctions at all. If, instead, the trial court decides to respond by imposing discovery sanctions or even defaulting the noncomplying party, then once again no review can be had at all -- either through an appeal or by way of mandamus -- until a final judgment has been entered in the case. But even the Sixth Circuit recognized that this situation is untenable, because "a direct appeal following final judgment is an inadequate remedy" to protect the attorney-client privilege. Pet. App. 16a-17a. Indeed, *only* if the trial court chose to proceed by imposing criminal contempt sanctions would the Sixth Circuit be correct in its blithe assumption that the noncomplying party will be able to seek immediate review to vindicate its lawful claim of privilege.

C. Forcing Parties into Contempt Is Unsatisfactory.

The Sixth Circuit's approach also is an utterly unsatisfactory means of ensuring effective judicial management. It treats casually the prospect that in many cases, litigants will be forced to engage in contumacious conduct in order to correct an erroneous ruling and vindicate their clear legal rights. Indeed, the Sixth Circuit's approach emphatically *requires* litigants to disobey trial court orders and go into contempt of those orders before they can seek to vindicate their rights and the legal privileges afforded them by law. This cynical approach breeds unwelcome disrespect for legal authority. And it ignores or underestimates the frictions and intransigence that this regime would build into the administration of justice in the trial courts. As such, it is inconsistent with this Court's recognition that where the only alternatives to compliance with an order "would risk serious criminal and civil penalties," it is appropriate to permit judicial review of a party's legal challenges to that order. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967).

Moreover, the Sixth Circuit's approach is unduly oppressive because it disregards the immediate hardship for litigants who are thus obliged to suffer the obloquy of being held in contempt. As Judge Haynsworth has aptly stated, no public or private litigant should be put to this choice:

> [A]ny litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful. . . . [C]ontempt proceedings . . . as a prerequisite to appellate review of the order would be such a hardship upon any litigant or witness that resort to a petition for mandamus or prohibition ought to be permitted.

Hemphill, 369 F.2d at 543. Thus, the Sixth Circuit fails to recognize the practical costs that its approach would impose upon litigants who simply wish in good faith to preserve their rights, without being branded as criminals or engaging in sanctionable conduct. By contrast, in other contexts this Court has recognized that even the imminent *threat* of criminal prosecution presents sufficient harm to confer standing to bring lawsuits and raise legal claims that otherwise would be barred at the jurisdictional threshold. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 10-14 (1972); *see also O'Shea v. Littleton*, 414 U.S. 488, 498 (1974).

In addition, even if a party were able to stand the pressure of incurring contempt sanctions and seeking later review of any such order, this Court has indicated that such an oppressive judicial regime would raise serious due process concerns. In *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), for example, the Court considered a statutory scheme whereby the only mechanism available for challenging certain rate orders was to stand in contempt of the law and incur cumulative penalties that mounted with each passing day. Recognizing that the obligatory regime of cumulative penalties was "such as might well deter even the boldest and most confident," the

Court unanimously held that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate." *Id.* at 336-337. *See also Ex parte Young*, 209 U.S. 123, 147 (1908) (same).

In short, the Sixth Circuit's problematic approach to the important procedural issues raised in this case warrants plenary review at this time.

III. THIS PETITION ADDRESSES IMPORTANT ISSUES OF JUDICIAL ADMINISTRATION THAT DIRECTLY AFFECT EVERY CIRCUIT COURT AND DISTRICT COURT NATIONWIDE.

The procedural issues that are squarely and cleanly raised by this petition for *certiorari* directly affect every circuit court and every district court nationwide. For purposes of sound judicial administration, it is critical that this Court intervene to establish a clear, uniform rule governing the proper relationship between the trial courts and the reviewing courts in terms of how a party may seek to vindicate a rightful claim of attorney-client privilege.

The issues raised in this case are especially important because they involve basic and systemic protection for the attorney-client privilege. It is well established in the Anglo-American legal system that the privilege is honored because it serves as an essential means to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389. Because it is "the oldest privilege protecting confidential communications," it "is also one of the most sacred and absolute." *Coleman v. American Broad. Co.*, 106 F.R.D. 201, 204 (D.D.C. 1985). Courts have commonly recognized that the wrongful disclosure of privileged materials causes irreparable harm and thus that specific procedural avenues must remain available to allow meaningful review of judicial orders that threaten to accomplish this unjust result. *See, e.g., In re Ford Motor Co.*, 110 F.3d at 963-64 (party would be "irremediably disadvantaged by erroneous disclosure" of privileged communications); *Harper & Row*, 423 F.2d at 492 (same);

Admiral Ins. Co., 881 F.2d at 1490-92 (granting mandamus relief to protect the attorney-client privilege because review was not available by any other means, since party may not immediately appeal a civil contempt order and irreparable harm can result from forced disclosure of privileged material). *Certiorari* review is warranted in this case to clarify the proper procedures that are to be followed by litigants and the lower federal courts in ensuring appropriate protection for the attorney-client privilege.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JORDAN B. CHERRICK
ARMSTRONG, TEASDALE,
SCHLAFLY & DAVIS
One Metropolitan Sq., 26th Flr.
St. Louis, Missouri 63102
(314) 621-5070

R. CHRIS HARVEY
JAMES K. PEDEN, III
ROSS T. ROBINSON
STRASBURGER & PRICE, LLP
901 Main Street, Ste. 4300
Dallas, Texas 75202
(214) 651-4300

PAUL T. CAPPUCCIO
Counsel of Record
RICHARD A. CORDRAY
JAY P. LEFKOWITZ
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington D.C. 20005
(202) 879-5000

TIMOTHY M. BURKE
MANLEY, BURKE,
LIPTON & COOK
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Attorneys for Petitioner

October 31, 1997

VALORIE LYNN GREAR, and husband
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON and
VERNBROOK, INC.,
Defendants.

No. 96-2417 GV

United States District Court
for the Western District of Tennessee
Western Division

July 7, 1997

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF TASK FORCE DOCUMENTS, DENYING DEFENDANT GENERAL MOTORS CORPORATION'S MOTION FOR PROTECTIVE ORDER, AND GRANTING PLAINTIFFS' MOTION TO COMPEL DISCOVERY

VESCOVO, U.S. Magistrate Judge:

Before the court are three discovery motions: (1) plaintiffs' Motion to Compel Production of Task Force Documents, (2) Defendant General Motors Corporation's Motion for Protective Order, and (3) plaintiffs' Motion to Compel Discovery. The motions were referred by District Judge Julia Smith Gibbons to the magistrate judge for determination.

This is an action for personal injuries arising out of an automobile accident that occurred on July 1, 1995. As alleged, plaintiff Valorie Grear was ejected from the driver's side of a 1995 Buick Skylark manufactured by defendant General Motors Corporation ("GM") immediately after colliding with another car. Plaintiffs have sued defendant GM on various theories of strict liability and tort based upon an allegedly defective design of the safety restraint and door-latching systems in GM automobiles. The safety restraint system in the Skylark included door-mounted seatbelts.

Two of the motions to be considered here, plaintiffs' Motion to Compel Production of Task Force Documents and Defendant General Motors' Motion for Protective Order, concern documents relating to GM's Automatic Restraint Task Force ("Task Force"). The Task Force was an internal group of GM engineers created in 1989. Very generally, the Task Force was formed to study the effectiveness of the existing design of door-mounted restraint systems and door-latching mechanisms on GM vehicles. The parties dispute whether the Task Force was created in anticipation of litigation.

On February 10, 1997, plaintiffs served their First Request for Production of Documents ("First Request for Production") on GM. Request No. 11 requested that GM "produce all documents relating to the meetings of and findings, conclusions, and studies of the Ad-Hoc Automatic Restraint Task Force, including, but not limited to, all handwritten notes, reports, studies and other memoranda." In Interrogatory No. 6 of plaintiffs' First Set of Interrogatories served February 7, 1997, plaintiffs requested a privilege log for all documents that GM had not produced either pursuant to initial Rule 26 disclosures or in response to the First Request for Production.

On March 11, 1997, GM submitted its responses to plaintiffs' First Request for Production and First Set of Interrogatories. GM objected to Request No. 11 on the grounds of the attorney-client privilege, work product doctrine, and self-critical analysis doctrine. GM's response made no effort, by privilege log or otherwise, to identify or describe the documents individually or by reasonable category.

As a result, on April 24, 1997, plaintiff filed the instant Motion to Compel Production of Task Force Documents. On April 25, 1997, GM countered by filing its own Motion for Protective Order, which sought to prevent disclosure of the Task Force documents on the basis of the above-mentioned privileges.[1]

On May 2, 1997, GM voluntarily produced to plaintiffs over six hundred documents which it identified as non-privileged Task Force documents.

On or about May 29, 1997, pursuant to the magistrate judge's instruction,[2] GM produced a privilege log identifying the remaining undisclosed Task Force documents. At the same time it produced the privilege log, GM unilaterally submitted a few selected Task Force documents to the magistrate judge for *in camera* inspection.

---

[1] On February 11, 1997, plaintiffs served GM with a Rule 30(b)(6) deposition notice. The notice instructed deponent in subparts 9 and 16 to bring certain Task Force documents to the deposition. GM's motion for protective order encompasses subparts 9 and 16 in the notice as well as Request #11.

[2] The magistrate judge discussed the status of the discovery dispute over the Task Force documents with counsel for both parties at a settlement conference held on May 23, 1997.

The third motion in question, plaintiff's Motion to Compel Discovery, filed May 6, 1997, seeks to compel production of documents and other materials regarding similar accidents, crash tests, lawsuits and complaints requested in plaintiffs' First Request for Production. GM objections to production on various grounds of irrelevance, burdensomeness and privilege.

The court will first consider the question of the Task Force documents and then treat plaintiffs' May 6, 1997 Motion to Compel Discovery.

I.

The threshold issue raised is whether defendant GM has waived its asserted privileges with respect to the Task Force documents for failure to properly and timely describe the documents. Fed.R.Civ.Proc. 26(b)(5) clearly provides:

> When any party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fed.R.Civ.Proc. 26(b)(5). As the Comment to Rule 26 notes, to withhold discoverable material without proper notification "is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege

or protection." Fed.R.Civ.Proc. 26(b)(5) (Advisory Committee Notes, 1993 Amendments).

In this vein, a "blanket objection" to discovery on grounds of privilege grounds [sic] is clearly contrary to Rule 26. "Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual discovery response, the resulting "blanket objection" is decidedly improper. This fact should no longer be "news" to a responding party." *Eureka Financial Corp. v. Hartford Accident & Indemnity Co.*, 136 F.R.D. 179, 182 (E.D. Calif. 1991) (citations omitted).

Plaintiffs cite a recent unpublished ruling from a similar case in the Eastern District of Arkansas, *Baranowski v. General Motors, et al.*, Docket No. LR-C-96-222. In the *Baranowski*, case, plaintiff was ejected from a GM car following a collision. In her May 15, 1997 Memorandum and Order, United States District Judge Susan Webber Wright ordered GM to produce its Task Force documents, which are the same Task Force documents at issue in this case. Judge Wright found, in part, that GM waived any privilege claim on the Task Force documents by failing to make any reasonable effort to identify the documents. While the Memorandum and Order in *Baranowski* is not binding here, the court considers its ruling on the issue of waiver to be persuasive.

In this case, the Task Force documents are clearly relevant to plaintiffs' claims and thus "otherwise discoverable." Therefore, GM was required, under Rule 26(b)(5), to describe the documents it withheld as privileged. GM first failed to provide identifying information on the documents as part of its initial disclosures under Rule 26. GM then totally failed to include a privilege log, or a reasonable equivalent, in its responses to the request for production. Almost two months

later, GM produced a portion of the Task Force documents which it had previously withheld as privileged, yet it again failed to identify the other withheld documents to enable plaintiffs to assess the claims of privilege. Even after receiving Judge Wright's ruling which clearly communicated to defendants the requirements of a privilege log or equivalent description of withheld documents under Fed.R.Civ.Proc. 26(b)(5), GM still failed to produce a privilege log. The only reason GM finally produced a privilege log is that it was instructed to do so by the magistrate judge. GM offers no valid reason for not timely identifying the Task Force documents claimed as privileged. Instead, the court finds persistent delay by GM with respect to identification of these documents and, therefore, a willful disregard for the notification requirements of Rule 26.

These failures are not corrected by GM's submission of documents for *in camera* scrutiny by the court. *See* 8 Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d §2016.1 (2d ed. 1994). To the contrary, the magistrate judge specifically told counsel for GM she was not interested in conducting an *in camera* inspection of Task Force documents at this time and that such may not be necessary at all if an appropriate privilege log was filed and sufficiently described the withheld documents. The court has not reviewed the documents submitted for an *in camera* inspection and declines to do so.

Therefore, under these circumstances, this court finds that defendant GM's failure to list the Task Force documents or otherwise make a timely or reasonable effort to identify those documents in its Rule 26(a)(1) disclosures and in response to specific discovery requests resulted in a waiver of the claimed privileges. Accordingly, defendant GM is ordered to produce the Task Force documents requested in plaintiff's Request for Production No. 11.

For these reasons, plaintiffs' Motion to Compel Production of Task Force Documents is granted and defendant General Motors' Motion for Protective Order is denied. GM is directed to produce the Task Force documents by July 15, 1997.

II.

Plaintiffs' Motion to Compel Discovery of May 6, 1997, alleged GM's refusal to produce documents and other materials in response to the Requests No. 2, No. 3, No. 9 f., g, and j.-p., No. 10, and No. 20 in plaintiffs' First Request for Production.

Plaintiff reports in its reply brief that after the motion to compel was filed, GM agreed to produce the following documents in partial satisfaction of the disputed requests:

> 1) Reports concerning an accident that caused a front door to come open or door latch mechanism failure involving 1992-1997 N-car sedans (Pontiac Grand Am, Buick Skylarks, and Oldsmobile Calais);
>
> 2) Certain 1241 reports, CPIR's (Collision Performance Injury Reports) and other incident reports containing information relevant to door-mounted passive belt systems in 1992-1996 N-car sedans or mini-wedge door latches in 1990-1997 N-car sedans; and,
>
> 3) Copies of reports and videotapes of crash tests, if any are found, relating to door or latch openings on full scale crash tests of vehicles utilizing the mini-wedge latch.

Regarding the above documents which GM has agreed to produce, plaintiffs request that defendant be ordered to produce them immediately.

With respect to the rest of the disputed document requests, it appears that plaintiffs' motion can be effectively resolved by addressing three areas of discovery: CPIR documents, crash test documentation, and documentation for GM vehicles other than 1992-1997 N-car vehicles.

Plaintiffs' Requests No. 9 and 10 seek certain CPIR documents. According to the affidavit of plaintiffs' expert engineer, Ed Kerr, which was filed in support of this motion, it is feasible to produce CPIR's for "side door opening" events. In an effort to minimize the burden on GM, plaintiffs propose to limit CPIR's to "side door opening" events. Thus, defendant GM is ordered to produce CPIR's, as requested in the disputed discovery requests, to the extent of CPIR's created for "side door opening" events.

Plaintiffs' Request No. 3 requested video tapes of any crash tests in which the mini-wedge door locking system failed. Defendant complained that this was an unduly burdensome request because of the large number of video tapes to be reviewed. As an alternative to their original request, plaintiffs propose that the same information be retrieved from GM's crash test database. The court finds that plaintiffs' alternative request would be less burdensome. Thus, defendant GM is ordered to produce a report from its crash test database on all crash tests involving vehicles containing the mini-wedge latch, indicating the total count of such tests performed. The report must include as many pieces of information that the database contains with respect to each crash test, including whether exterior doors remained closed and/or latched.

Finally, GM argues that plaintiffs' discovery should be restricted to documentation of failed door-mounted restraint systems on N-car sedans manufactured in 1992 through 1996. The court finds that documents indicating a failure or defect of the same safety restraint system and mini-wedge door latch involved in this case are relevant and discoverable whether it was in an N-car or other GM vehicle. GM's brief states that the mini-wedge latch has been used in GM cars dating from the 1990 model year. The court therefore orders defendant GM to produce the pertinent information sought as to lawsuits, complaints, reports and tests in Requests No. 2 and 3, to the extent such information has not already been produced, for all GM vehicles manufactured since the 1990 model year, not limited to N-cars.

For the above reasons, plaintiff's Motion to Compel Discovery is granted. GM is directed to produce the documents indicated in this order by July 15, 1997.

IT IS SO ORDERED.

_____

DIANE K. VESCOVO
U.S. MAGISTRATE JUDGE

DATE:_____

VALORIE LYNN GREAR and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.

No. 96-2417-G/V

United States District Court
for the Western District of Tennessee
Western Division

August 1, 1997

GIBBONS, District Judge:

Before the court are defendant General Motors Corporation's objections to the order of the United States Magistrate Judge entered July 8, 1997. The court has reviewed defendant's objections, plaintiffs' response and the entire record pertaining to this matter. The magistrate judge's ruling is not clearly erroneous or contrary to law. It is therefore affirmed. Defendant is ordered to produce all of the documents covered by the order, no later than August 8, 1997.

IT IS SO ORDERED.

JULIA SMITH GIBBONS
U.S. DISTRICT JUDGE

DATE

VALORIE LYNN GREAR, and husband
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.,
Defendants.

No. 96-2417-G

United States District Court
for the Western District of Tennessee
Western Division

August 8, 1997

ORDER DENYING STAY AND
EXTENDING TIME FOR DOCUMENT PRODUCTION

GIBBONS, District Judge:

Before the court is defendant General Motors Corporation's motion for emergency stay of this court's August 1, 1997 order. The court denies the motion for stay. Any stay of this court's order will have to be obtained from the United States Court of Appeals for the Sixth Circuit. The court will extend the time for production of the documents covered by its order until August 15, 1997.

IT IS SO ORDERED.

JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

DATE

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.
Defendants.

No. 97-5968

IN RE GENERAL MOTORS CORPORATION,
Petitioner.

No. 97-5989

United States Court of Appeals
for the Sixth Circuit

August 13, 1997

ORDER

ENTERED BY ORDER OF THE COURT:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product privilege. The district court found that GM waived any privilege it may have had and ordered the document produced by August 8, 1997. GM filed a notice of appeal from the ruling (Case No. 97-5968) and also petitions this court for a writ of mandamus (Case No.

97-5989). GM seeks a stay of the order directing production pending a determination of the appeal and the petition for a writ of mandamus. The district court denied GM's motion for a stay pending appeal, but extended the time for production of the document to August 15, 1997. GM also seeks leave to file a copy of the document under seal in this court.

Due to the exigent nature of the relief requested, this matter is being initially referred to a single judge of the court. *See* Fed. R. App. P. 8A(a). The production of the document by GM will be stayed temporarily to permit consideration of the issues raised by a three-judge panel of the court. The plaintiffs are directed to file a response to the emergency motion for a stay and to the petition for a writ of mandamus by August 22, 1997. The court's appellate jurisdiction should also be addressed by the plaintiffs.

It therefore is ORDERED that the order directing GM to produce the ten-page memorandum is stayed pending further order of the court. GM's motion to file a copy of the document under seal is granted.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.
Defendants.

No. 97-5968

United States Court of Appeals
for the Sixth Circuit

September 17, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. The district court found that GM waived any privilege it may have had and ordered the document produced. GM filed this appeal form the discovery ruling and also sought review in mandamus. GM moved for a stay of the production of the document pending its appeal and pending consideration of the petition for a writ of mandamus. On August 13, 1997, the court granted a temporary stay of production to facilitate consideration of the issues by a three-judge panel of the court. The matter is before the court to consider the plaintiffs' motion to dismiss the

appeal for lack of jurisdiction and GM's motion for a stay pending appeal. GM opposes the motion to dismiss; the plaintiffs oppose the motion for stay.

This court has jurisdiction of appeals from final orders of the district court. 28 U.S.C. § 1291. The district court's discovery ruling is not the final district court order in this litigation. GM maintains, however, that the ruling should be appealable as a collateral order. This court has consistently held that "orders denying or granting discovery are not appealable under the collateral order doctrine." *Coleman v. American Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992); *see Federal Deposit Ins. Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990); *Dow Chemical Co. v. Taylor*, 519 F.2d 352, 354-55 (6th Cir. 1975). If a party seeks an immediate appeal of the matter, the party should submit to contempt and then appeal the contempt ruling. *See United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (order). Although the Third Circuit recently concluded in *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), that a district court ruling ordering production of documents claimed to be privileged under the attorney-client and work-product doctrine was an appealable collateral order, we decline to adopt the reasoning of that case.

It therefore is ORDERED that the motion to dismiss is granted. The temporary stay issued by the court on August 13, 1997, is dissolved. GM's motion for a stay of the production of the document pending appeal is denied as moot.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

IN RE GENERAL MOTORS CORPORATION,
Petitioner.

No. 97-5989

United States Court of Appeals
for the Sixth Circuit

September 17, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. The district court found that GM waived any privilege it may have had and ordered the document produced. GM petitions for a writ of mandamus directing the district court to vacate the order requiring production of the document. GM moved for a stay of production pending consideration of its mandamus petition and of its appeal from the order. On August 13, 1997, the court issued a temporary stay of the district court's ruling. The plaintiffs oppose the petition for a writ of mandamus and the motion for a stay.

A party seeking mandamus must have no other means of obtaining the relief he desires and must demonstrate a "clear and indisputable" right to that relief. *Kerr v. United States District Court*, 426 U.S. 364, 402 (1976). GM argues that a direct appeal of the privilege issue following disclosure of document and entry of final judgment is inadequate. Although a direct appeal following final judgment is an inadequate

remedy, GM can obtain appellate review by submitting to contempt and appealing the contempt ruling. *See United States v. James T. Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (order); *Dow Chemical Co. v. Taylor*, 519 F.2d 352, 354-55 (6th Cir. 1975).

It therefore is ORDERED that the petition for a writ of mandamus is denied. The August 13, 1997, temporary stay is dissolved, and the motion for stay pending review is denied as moot.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. HORDBERG,
Plaintiffs-Appellees,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant,
CAROL R. VERNON; VERNBROOK, INC.,
Defendants.
IN RE GENERAL MOTORS CORPORATION,
Petitioner.

Nos. 97-5968 & 97-5989

United States Court of Appeals
for the Sixth Circuit

October 13, 1997

ORDER

KENNEDY, GUY, and SILER, Circuit Judges:

In this diversity products liability action, the district court granted the plaintiffs' motion to compel the production of a ten-page memorandum that defendant General Motors Corporation ("GM") asserts is protected from disclosure by the attorney-client privilege and the work-product doctrine. GM filed an appeal from the discovery ruling and also sought review in mandamus. On September 17, 1997, the court dismissed the appeal for lack of jurisdiction and denied the petition for writ of mandamus.

GM now seeks an emergency stay of the mandate for thirty days to permit the filing of a petition for writ of certiorari in the Supreme Court. In addition, GM seeks a stay of the

production of the document pending review by the Supreme Court. We conclude that the issuance of the mandate should be stayed for thirty days. *See* Sixth Circuit Rule 15. In addition, we will stay the production of the disputed document for a thirty-day period to permit GM to file a motion for a stay in the Supreme Court. If such a motion is filed, the stay will continue until the Supreme Court disposes of the stay motion.

It therefore is ORDERED that the mandate is stay [sic] for a period of thirty-days in order to permit the filing of a petition for writ of certiorari. The production of the document by GM is stayed for thirty days to permit the filing of a motion for a stay in the Supreme Court. If a stay motion is filed within thirty days, the production of the document will be stayed pending the disposition of the motion for a stay by the Supreme Court.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

VALORIE LYNN GREAR, and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.
Defendants.

No. 96-2417-G

United States District Court
for the Western District of Tennessee
Western Division

May 14, 1997 (Submitted)
May 15, 1997 (Filed)

SUBMISSION OF AFFIDAVIT OF JAMES A. DURKIN

COMES NOW, General Motors Corporation ("GM") and submits the attached Affidavit of James A. Durkin in support of Defendant General Motors Corporation's Motion for Protective Order in the above-referenced case.

Respectfully submitted,

R. CHRIS HARVEY
State Bar No. 09181000
ROSS T. ROBINSON
State Bar No. 00788300
STRASBURGER & PRICE, LLP

901 Main Street
4300 NationsBank Plaza
Dallas, Texas 75202
214/651-4300
214/651-4330 (Facsimile)

and

Larry E. Killebriew (#7964)
Bradley E. Trammell (#13980)
BAKER, DONELSON,
BEARMAN & CALDWELL
2000 First Tennessee Building
Memphis, Tennessee 38103
(901) 526-2000

ATTORNEYS FOR DEFENDANT
GENERAL MOTORS CORP.

CERTIFICATE OF SERVICE

This is to certify that a true and correct of the foregoing document has been forwarded via certified mail, return receipt requested to all counsel of record on this 14th day of May, 1997.

_____

ROSS T. ROBINSON

VALORIE LYNN GREAR, and husband,
PAUL C. NORDBERG,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
KAROL R. VERNON, and
VERNBROOK, INC.
Defendants.

No. 96-2417-G

United States District Court
Western District of Tennessee
Western Division

May 13, 1997

AFFIDAVIT OF JAMES A. DURKIN

I, JAMES A. DURKIN, after first being duly sworn, state the following in support of General Motors' claims of privilege as related to its production of documents in this litigation.

1. I give this affidavit in support of General Motors Corporation's claims of privilege over documents that should be exempted from production. I have personal knowledge of the matters stated herein and am competent to testify thereto.

2. I am an attorney licensed to practice law in the State of Michigan and am currently a member of the General Motors Corporation ("GM") Legal Staff. I have been a member of GM Legal Staff since 1965.

3. From May 1987 to July 1990, I served as the legal advisor to General Motors' General Technical Committee (GTC). In that position, I provided members of the GTC with legal advice and related information to assist Committee members in making decisions in the performance of their Committee and corporate duties.

December 12, 1989 Memorandum:

4. On November 17, 1989, at a meeting of the GTC, I made a request for technical assistance in anticipation of litigation against General Motors regarding door-mounted restraint systems. More specifically, I sought the assistance of knowledgeable engineers to support Legal Staff in its effort to provide legal advice to GM regarding the defensibility of its passive restraint systems and the potential for claims alleging defects in such systems as installed in variety of GM vehicles. To further GM's defense efforts in these cases, and to facilitate the rendition of professional legal services to General Motors, I concluded that I, as well as other members of the Legal Staff, needed assistance that could be provided by knowledgeable GM engineers.

5. My request for assistance was initially made orally to the GTC and then communicated in writing in a confidential December 12, 1989 memo from me to Edward W. Hufnagle, the Chairman of the GTC's Body Subcommittee, and Albert R. Bernat and John G. Haviland, the Co-Chairmen of the GTC's Occupant Protection Safety System Subcommittee. (*See* December 12, 1989 memorandum at Bates Nos. 002783-84). Each of these three persons had the authority, within the scope of his duties as a GM employee, to identify and assign GM engineers and other GM employees to provide assistance to me and other members of the Legal Staff as requested.

6. My December 12 memo was copied to certain members of the GTC, including Ronald H. Haas, Arvin F. Mueller, Donald J. Runkle, Thomas J. Davis, Robert L. Dorn, Roger W. Masch and to certain GM Legal Staff attorneys, including Harry J. Pearce, GM's General Counsel, George F. Ball, Douglas E. Brown, Dennis R. Minano and Gary Toth. My memorandum was so distributed because it was my belief that each of these individuals needed to be aware of the assistance I was seeking, both to accommodate the new time demands that would be placed on task force engineers and to benefit from the information that would be gained. I anticipated that my memorandum would remain "privileged and confidential" and labeled it accordingly.

7. In my December 12 memo, I specifically advised the addressees that all work done pursuant to my request for assistance should be considered "confidential" and protected by the attorney-client privilege and the attorney work-product exemption. I further advised the addressees that the records or reports generated by any advising engineer should be treated as confidential and communicated only to the attorneys responsible for providing GM with advice or defending GM in related litigation.

8. As the result of my request for technical assistance, the Automatic Restraint Task Force (the "Task Force") was created. Robert Sinke served as the Task Force Chairman and Gary Toth, a member of GM Legal Staff, served as one of the Task Force's principal legal advisors. The Task Force consisted of approximately ten General Motors engineers.

9. The purpose of the Task Force was to provide the Legal Staff with information and engineering evaluations on the technical issues raised in connection with anticipated litigation against General Motors. As noted above, the purpose

of these communications was to enable me and other members of the Legal Staff to provide legal advice to General Motors and to prepare for the defense of anticipated litigation.

April 23, 1990 Memorandum:

10. In connection with my continuing role as legal advisor to the General Technical Committee, I asked Gary Toth and Doug Brown, both members of GM's Legal Staff, to prepare a memorandum analyzing available technical information related to the use of automatic belt systems.

11. Pursuant to my request, Mr. Toth and Mr. Brown prepared a memorandum on the requested issues which contained their thoughts and mental impressions as attorneys representing the interests of General Motors. The memorandum was prepared with the anticipation that it would remain confidential and be used solely to provide legal advice to the GTC and to defend litigation claims against General Motors. A copy of Mr. Toth and Mr. Brown's memorandum, including all attachments, can be found at Bates Nos. 284034-50.

12. To properly advise the GTC, I concluded that it was important that certain GTC members understand the potential legal implications of the comparative analyses contained in the confidential memorandum. I therefore forwarded a copy of the confidential memorandum to certain members of the GTC, including Donald L. Runkle, a GM Vice-President and Chairman of the GTC; Ronald H. Haas, a GM Vice-President in Current Engineering and Betsy Ancker-Johnson, a GM Vice-President in Environmental Activities. I also forwarded a copy of the memorandum to Albert R. Bernat and John G. Haviland, Co-Chairmen of the GTC's Occupant Protection Safety System Subcommittee, and Robert A. Rogers, Director of Automotive Safety Engineering, who had general oversight responsibility on safety matters. Finally, a

copy of the memorandum was forwarded to Robert A. Sinke, the Chairman of the Automatic Restraint Task Force. A copy of my memorandum directing this distribution can be found at Bates No. 284033.

13. The confidential memorandum was circulated to these individuals for the purpose of providing them with the underlying analysis for the legal advice I had provided to them in their respective capacities in connection with the GTC, the senior technical committee that was responsible for advising the Corporation on technical issues. The memorandum was forwarded with the expectation that it would be kept confidential and used by these persons only in connection with the implementation of legal advice or in the defense of General Motors in anticipated litigation.

14. A true and correct copy of each of the documents referenced in this affidavit will be provided to the Court for *in camera* review.

FURTHER AFFIANT SAYETH NOT.

_____
James A. Durkin

Subscribed and sworn to before me this ____ day of _____, 1997.

_____
Notary Pubic

Supreme Court, U.S.
FILED
JAN 5 1998
CLERK

No. 97-766

In the Supreme Court of the United States

OCTOBER TERM, 1997

HARBOR BANCORP & SUBSIDIARIES, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
RICHARD FARBER
EDWARD T. PERELMUTER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the interest received by petitioners on bonds issued by the Housing Authority of Riverside, California, is excluded from their gross income because the bonds are not "arbitrage bonds" under Section 148(f) of the Internal Revenue Code, 26 U.S.C. 148(f).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	18

TABLE OF AUTHORITIES

Cases:

BFP v. *RTC*, 511 U.S. 531 (1994)	13
City of Columbus v. *Commissioner*, 112 F.3d 1201 (D.C. Cir. 1997)	14
Commissioner v. *Court Holding Co.*, 324 U.S. 331 (1945)	16
Commissioner v. *Jacobson*, 336 U.S. 28 (1949)	14
Commissioner v. *Schleier*, 515 U.S. 323 (1995)	14
Commissioner v. *Tower*, 327 U.S. 280 (1946)	16
Frank Lyon Co. v. *United States*, 435 U.S. 561 (1978)	16, 17
Hubbard v. *United States*, 514 U.S. 695 (1995)	13
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	16
United States v. *Centennial Savings Bank FSB*, 499 U.S. 573 (1991)	14

Statutes and regulations:

Internal Revenue Code (26 U.S.C.):	
§ 103(a)	2
§ 103(b)(2)	2, 11, 14
§ 148	2, 8, 9, 10, 12, 14, 15
§ 148(a)	11
§ 148(b)(2)(B)	12
§ 148(b)(2)(C)	12
§ 148(b)(2)(D)	12
§ 148(f)	8, 9, 10, 11, 12, 13, 14, 15
§ 148(f)(1)	2

Statutes and regulations—Continued: Page

§ 148(f)(2) 2, 8, 11
§ 148(f)(3) 12
§ 148(f)(6)(A) 2
§ 148(f)(6)(A)(i) 12
§ 148(f)(6)(A)(ii) 12
Tax Reform Act of 1986, Pub. L. No. 99-514,
§ 1314(d)(1), 100 Stat. 2664 15
Treas. Reg. (26 C.F.R.):
§ 1.103-13(b)(6) (1979) 16
§ 1.150-1(c)(2) (1992) 16

Miscellaneous:

S. Rep. No. 313, 99th Cong., 2d Sess. (1986) 11

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-766

HARBOR BANCORP & SUBSIDIARIES, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A26-A50) is reported at 115 F.3d 722. The opinion of the Tax Court (Pet. App. A51-A104) is reported at 105 T.C. 260.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1997. A petition for rehearing was denied on August 20, 1997. Pet. App. A105. The petition for a writ of certiorari was filed on November 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Interest received by the holders of bonds issued by state or local governments is ordinarily excluded from the federal income tax. 26 U.S.C. 103(a). Since 1986, however, the Internal Revenue Code has expressly provided that interest received on such bonds *is* subject to federal tax if the bond is an "arbitrage bond (within the meaning of Section 148)" of the Code. 26 U.S.C. 103(b)(2). An "arbitrage bond" is defined in Section 148 to include a bond with respect to which the issuer fails to pay to the United States the excess of the amount earned on "all nonpurpose investments" over the amount which would have been earned "at a rate equal to the yield on the issue" (26 U.S.C. 148(f)(1),(2)). A "nonpurpose investment" is "any investment property" that is "acquired with the gross proceeds of an issue, and * * * is not acquired in order to carry out the governmental purpose of the issue." 26 U.S.C. 148(f)(6)(A).

2. In late 1985, the County of Riverside, California, authorized its Housing Authority to issue bonds to finance the construction of two multifamily housing projects known as the Whitewater and Ironwood Projects (Pet. App. A28).[1] These projects were to be developed by a private corporation (SBE Development, Inc.) under a "conduit" financing plan. A "conduit" plan is one under which the public issuer of the bonds is to channel the funds to a private entity for a public purpose (*id.* at A28-A29).

In an effort to qualify the bonds for tax exempt treatment under 26 U.S.C. 103(a), a plan was

---

[1] The bonds issued for the Whitewater project were to total $17.2 million, and the bonds for the Ironwood project totalled $13 million (Pet. App. A56-A57).

formulated that involved an intricate arrangement among multiple parties. The Housing Authority was to issue the bonds through two underwriters, Donaldson, Lufkin & Jenrette Securities and Drexel, Burnham, Lambert, Inc.[2] The proceeds were to be deposited in a "Developer Loan Fund" at a trustee bank (Interfirst Bank of Houston) for use by SBE Development in exchange for a note from the developer (Pet. App. A54). As security for the note, SBE Development was to obtain irrevocable letters of credit (to be deposited in a "Debt Service Fund" at Interfirst Bank) from two entities that were to be formed solely for the purpose of providing letters of credit for the projects (*id.* at A55). The letter of credit provider for the Whitewater project was named Mercantile Capital Finance Corp. No. 47 (MCFC No. 47) and the letter of credit provider for the Ironwood project was named Mercantile Capital Finance Corp. No. 30 (MCFC No. 30) (*ibid.*). The sole shareholder of these two corporations was James J. Keefe (*ibid.*). In exchange for the letters of credit, SBE Development was to provide the MCFC entities with reimbursement notes that paid interest at the rate of interest on the bonds and were secured by a mortgage on the property to be developed (*ibid.*).

Because the MCFC corporations were single-purpose entities and lacked significant capitalization, the letters of credit to be issued by them were not sufficient security for repayment of the bonds. The parties therefore contemplated that the MCFC corporations would sell the reimbursement notes (at a

---

[2] Drexel's role was limited from the outset, and it eventually dropped out of the underwriting activity on the projects (Pet. App. A30).

discount) to Unified Capital Corp., an entity that was also owned in part by Keefe (Pet. App. A55). The MCFC corporations were then to use the cash obtained from Unified Capital to purchase two "guaranteed investment contracts" from a reliable financial institution that would pay interest at rates above the interest rates on the bonds (*ibid.*).[3] These "guaranteed investment contracts" were to secure all payments of principal and interest coming due under the letters of credit.

3. a. In December 1985, SBE Development executed "Deposit Agreements" that gave control over the bond proceeds to Unified Capital (Pet. App. A33). SBE Development made these agreements on the understanding that Unified would thereafter disburse the money as required for project purposes (*ibid.*). The Riverside Housing Authority was not informed of the existence of the deposit agreements (*ibid.*).

A closing for the Whitewater and Ironwood bond issues was scheduled for December 31, 1985. The bonds were not, however, to be marketed to the public at that time. Instead, they were to be marketed sometime in 1986, after they had been rated by Standard & Poor's Corp. (Pet. App. A58-A59). The December 31 closing date was chosen in an effort to avoid a change in the tax law that Congress had enacted to impose new and more restrictive "arbitrage bond" rules for governmental bonds issued after December 31, 1985 (*id.* at A29).

---

[3] The yield on the bonds was 7.3750 percent for the Whitewater project and 7.66652 percent for the Ironwood project (Pet. App. A76). The yield on the "guaranteed investment contracts" was 9.5520 percent (*ibid.*).

b. Shortly before the scheduled closing date, the investment banker who was handling this project for the underwriting firm of Donaldson, Lufkin and Jenrette learned that his firm was financially unable to bring the Whitewater and Ironwood bonds to market due to the large number of bond closings scheduled for December 31, 1985 (Pet. App. A58). He then contacted Arthur Goldberg, vice president at the investment banking firm of Matthews & Wright, Inc., to determine if that firm could act as a substitute underwriter (*ibid.*). Goldberg agreed that Matthews & Wright would take over as underwriter of the Whitewater and Ironwood bond issues (*ibid.*).

c. In addition to his duties at Matthews & Wright, Goldberg headed a credit institution located in Jersey City, New Jersey, named the New American Federal Credit Union (Pet. App. A59). On December 31, 1985, Goldberg instructed the general manager of New American to bring "starter kit" books of the credit union's share drafts (the functional equivalent of checks) to the offices of Matthews & Wright (*ibid.*). At what purported to be a "closing" on that date, Goldberg executed share drafts from the "starter kits" for the purported (but nonexistent) accounts of off-shore entities in exchange for what purported to be issuances of the bonds (*id.* at A31). On that same date, Goldberg repeated this same purported "closing" for numerous other transactions on behalf of Matthews and Wright, utilizing "starter kits" to issue share drafts on nonexistent accounts for "a total of some $750 million, or about 15 times the credit union's assets" (*ibid.*).

Neither Matthews & Wright nor New American had sufficient funds to cover the share drafts (Pet. App. A31). The transactions by Goldberg on

December 31, 1985, accomplished nothing of substance: a circular check kiting scheme occurred in which the share drafts ostensibly used to purchase the Whitewater and Ironwood bonds were drawn on nonexistent accounts of off-shore entities and were then held outside of banking channels by Matthews & Wright (*id.* at A60).[4]

d. On February 20, 1986, Matthews & Wright borrowed approximately $58 million from Security Pacific National Bank (Pet. App. A63). Some of this money was wire transferred to Chase Manhattan Bank for the account of New American (*ibid.*), from which it was transferred to Heritage National Bank of Austin, Texas (*ibid.*). Heritage then deposited $17,778,146.53 in an account opened in the name of Whitewater, Ltd. (*ibid.*). This amount was again immediately transferred to an account in the name of Unified Capital at Heritage (*ibid.*).

On February 20, 1986, Unified Capital made several disbursements from this account, including fees paid to itself (Pet. App. A64). Unified Capital also transferred $16,110,817.98 to another account at Heritage for MCFC No. 47 (*ibid.*). MCFC No. 47 used this amount to purchase a "guaranteed investment contract" from Crown Life Insurance Company

---

[4] The circular check scheme included the participation of an entity named "Commercial Bank of the Americas, Ltd.," which was ostensibly located on the island of Saipan in the Northern Mariana Islands. The Commercial Bank of the Americas had lost its banking charter prior to the date of the purported closing (Pet. App. A59). The entire assets of Commercial Bank on that date, when it purportedly purchased $31 million of bonds in this transaction, were $5,011 (*id.* at A60). The circular check scheme employed by Goldberg is described in detail in the opinions below (*id.* at A30-A32, A59-A60).

(*ibid.*). The payments yielded by the investment contract equalled the debt service required to pay interest as it came due on the Whitewater bonds (*id.* at A65). MCFC No. 47 pledged the investment contract to Interfirst Bank, thereby allowing the trustee bank to make scheduled payments to the bondholders (*ibid.*).

e. A similar transaction occurred with respect to the Ironwood bonds on February 20, 1986. On that date, Heritage deposited $12,190,843.34 in an account opened in the name of Ironwood, Ltd. That sum was then again immediately transferred to an account of Unified Capital at Heritage (Pet. App. A64). Unified Capital transferred $11,047,408.05 of this amount to an account for MCFC No. 30 at Heritage (*ibid.*). MCFC No. 30 used this amount to purchase a "guaranteed investment contract" from Crown Life Insurance Company (*ibid.*). The payments yielded by the investment contract equalled the debt service required to pay interest as it came due on the Ironwood bonds (*id.* at A65). MCFC No. 30 pledged the investment contract to Interfirst Bank, thereby allowing the trustee bank to make scheduled payments to the bondholders (*ibid.*).

f. Because of the manner in which these transactions were executed, the sums invested in the "guaranteed investment contracts" were not available for construction of the Whitewater and Ironwood proj ects (Pet. App. A64). As the result, the Whitewater project was never constructed. The Ironwood project was completed several years later, after SBE Development obtained a commercial construction loan from a savings and loan association (*id.* at A65-A66).

4. In July 1986, petitioners acquired Whitewater and Ironwood bonds (Pet. App. A66). Petitioners ex-

cluded the interest they received on those bonds from gross income on their federal income tax returns (*id.* at A67). After investigating the circumstances surrounding the issuance of the Whitewater and Ironwood bonds, however, the Internal Revenue Service determined (i) that the bonds were not issued until 1986 and were therefore subject to the statutory limitations on "arbitrage bonds" in Section 148 of the Internal Revenue Code and (ii) that the investment of the bond proceeds in the higher yielding "guaranteed investment contracts" brought the bonds within the definition of "arbitrage bonds" that are subject to federal income tax under that Section.

The Service informed the Housing Authority that, under Section 148(f)(2), interest paid on the bonds must be treated as taxable income to the bondholders unless the issuer pays to the United States the excess of the yield of the guaranteed investment contract (the "nonpurpose investment") over the "yield on the issue" (26 U.S.C. 148(f)(2)). The Service calculated that amount to be $3.8 million in this case (Pet. App. A67). When the issuer refused to make this payment, the Service asserted deficiencies in tax against petitioners for the relevant taxable years (*id.* at A51-A52).

5. a. Petitioners sought review of the Commissioner's determinations in the Tax Court. Petitioners claimed that the Whitewater and Ironwood bonds were not "arbitrage bonds" under Section 148(f) for two reasons. First, petitioners asserted that the bonds were "issued" for federal tax purposes on December 31, 1985, one day before the effective date of the statute. In the alternative, petitioners asserted that Section 148(f) applies only to "nonpurpose investments" made by the issuer of the bond and that the

Whitewater and Ironwood bond proceeds had been invested in the higher yielding "guaranteed investment contract" by a nonissuer who was acting without authority in doing so.

b. In a reviewed opinion joined in by 14 judges (with three judges concurring and one in dissent), the Tax Court upheld the Commissioner's determination that the income from these bonds is not tax exempt because they are "arbitrage bonds" within the meaning of 26 U.S.C. 148(f). The court first held that the putative "closing" that occurred on December 31, 1985, was an obvious sham that lacked economic substance (Pet. App. A68-A69). The court concluded that "the date of issue of the Bonds was not December 31, 1985, but rather February 20, 1986, when actual funds were transferred from Security Pacific Bank * * * to purchase the bonds" (*id.* at A69). The court then held that, under the plain text of Section 148(f), the bonds were "arbitrage bonds" because (i) the bond proceeds were invested in guaranteed investment contracts that were "nonpurpose investments" and (ii) the amount earned on those contracts exceeded the amount that would have been earned if the bond proceeds had been invested at the yield rate on the bonds (*id.* at A69-A84).

The court rejected petitioners' contention that Section 148(f) is inapplicable because neither the Housing Authority nor the designated private developer (SBE Development) made the decision to invest the bond proceeds in the "guaranteed investment contracts." The court pointed out that, unlike other provisions concerning "arbitrage bonds" in Section 148, the restrictions established by Congress in Section 148(f) do not turn on whether the issuer itself intends

to or does profit from arbitrage bonds (Pet. App. A71-A72).

6. The court of appeals affirmed (Pet. App. A26-A50).[5] The court described in careful detail the evidence that supported the finding of the Tax Court that the purported closing on December 31, 1985, was merely a "sham" that lacked economic substance (*id.* at A35-A41). Based upon this evidence, the court held that "[t]he Tax Court was entitled to find that the December 31 transactions weren't real, and that the bonds were actually issued February 20, 1986" (*id.* at A41). The court therefore agreed with the Tax Court that the "arbitrage bond" provisions of Section 148 apply to the bonds involved in this case (*ibid.*).

The court of appeals then held that the bonds issued by the Housing Authority were "arbitrage bonds" under that statute (Pet. App. A41-A50). Unlike the Tax Court, the court of appeals believed the language of the statute to be ambiguous "as applied in this case" (*id.* at A45-A46, A49). The court held, however, that, among the competing alternatives, the Commissioner's interpretation of Section 148(f) was the most "persuasive construction of [this] complex provision of the Tax Code" (*id.* at A50). The court noted that the Commissioner's interpretation of the statute (*id.* at A50):

> will encourage bond issuers to maintain tight control over the proceeds, and will protect federal taxpayers from having to subsidize unapproved,

---

[5] The original opinion of the court of appeals (Pet. App. A1-A25) was issued on June 10, 1997. In response to a petition for rehearing filed by petitioners, the court of appeals issued an amended opinion on August 6, 1997 (*id.* at A26-A50).

non-governmental uses of tax-free state and municipal obligations.

ARGUMENT

The court of appeals correctly held that the bonds involved in this case are "arbitrage bonds" within the meaning of 26 U.S.C. 148(f) and that the interest that petitioners received on those bonds is therefore not excluded from their gross income. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Indeed, as petitioners acknowledge (Pet. 19), this is a case of first impression. Further review is therefore not warranted.

1. a. The interest received by a private investor on any "arbitrage bond" issued by a state or local government is not excluded from federal income tax. 26 U.S.C. 103(b)(2). Under Section 148 of the Internal Revenue Code, bonds issued by state or local governments are treated as "arbitrage bonds" in three situations: (i) if, at the time of issuance, any portion of the proceeds is "reasonably expected" to be used to acquire higher yielding investments (26 U.S.C. 148(a)), (ii) if, subsequent to the date of issuance, the issuer intentionally uses any portion of the proceeds to acquire higher yielding investments (*ibid.*) and (iii) if, in any event, the proceeds are invested in higher yielding investments that are not related to the governmental purpose of the bond ("nonpurpose investments") and the issuer does not pay the United States the difference between the yield on that investment and the yield on the bond (26 U.S.C. 148(f)(2)). In the first two situations, bond interest is taxable retroactive to the date the bonds are issued, and the issuer may not cure the defect by paying the

arbitrage amount to the United States. See S. Rep. No. 313, 99th Cong., 2d Sess. 845 (1986). In the third situation, interest received by bondholders is also taxable retroactive to the date of issue if the issuer does not pay the arbitrage amount to the United States under the procedures of Section 148. See 26 U.S.C 148(f)(3).

The courts below correctly held that the Whitewater and Ironwood bonds are "arbitrage bonds" under this statute. An "arbitrage bond" exists under Section 148(f) if (i) the gross proceeds of the issue are invested in a "nonpurpose investment," (ii) the nonpurpose investment earns a higher rate of return than the yield rate on the bond and (iii) the issuer does not pay the arbitrage amount to the United States. The term "nonpurpose investments" is defined as "any investment property which is acquired with the gross proceeds of an issue and is not acquired in order to carry out the governmental purpose of the issue." 26 U.S.C. 148(f)(6)(A)(i) and (ii). The term "investment property" includes "any obligation," "any annuity contract" and "any investment-type property." 26 U.S.C. 148(b)(2)(B), (C) and (D).

The proceeds of the Whitewater and Ironwood bonds were unquestionably invested in "nonpurpose investments" as that term is expressly defined, since the guaranteed investment contracts were not acquired to carry out the governmental purpose of constructing multifamily housing. See page 7, *supra*. It is also evident that the amounts earned on those investment contracts substantially exceeded the amounts that would have been earned if the bond proceeds had been invested at the yield rate of the bonds (Pet. App. A74-A77). See note 3, *supra*. Finally, it is undisputed that the bond issuer did not pay the arbitrage amount to

the United States. For the reasons explained in detail by the Tax Court (Pet. App. A69-A84), the Whitewater and Ironwood bonds are thus "arbitrage bonds" under the plain text of Section 148(f). The interest received by petitioners on those bonds is therefore not exempt from taxation. As this Court emphasized in *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995), quoting *BFP* v. *RTC*, 511 U.S. 531, 570 (1994) (Souter J., dissenting), "absent any 'indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.'"

b. The court of appeals reached the same conclusion, but by a different route. The court of appeals held that the statute is not unambiguous as applied to this case, in which the "nonpurpose investment" was made by an entity that obtained the proceeds of the bond from the issuer and was not made by the issuer itself (Pet. App. A45-A46). The court concluded, however, that the interpretation advanced by the Commissioner is the more persuasive of the alternative constructions because it advances the purpose of the statute to restrain misapplication of tax-exempt fundings (*id.* at A50).

Petitioners contend (Pet. 13-19) that the court of appeals erred by construing an "ambiguous" tax provision against the taxpayer.[6] It is well established,

---

[6] Petitioners also object to portions of the original decision of the court of appeals that were deleted by that court in response to the petition for rehearing. Compare Pet. 18 ("the court was required to make its own analysis") with Pet. 7 (the amended opinion "deleted most of the express indications of deference to the Commissioner"). It is obviously the amended opinion—not the original opinion which was withdrawn—that constitutes the decision in this case. The grievances that peti-

however, that statutes governing exclusions from income are to be strictly construed in favor of the government.[7] *Commissioner* v. *Schleier*, 515 U.S. 323, 328 (1995); *United States* v. *Centennial Savings Bank FSB*, 499 U.S. 573, 583-584 (1991); *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949). The provisions of Section 148(f) operate, in coordination with Section 103(b)(2), to determine whether income received from state and local bonds is excluded from tax. See 26 U.S.C. 103(b)(2). As both courts below correctly observed, that statute is therefore to be interpreted strictly in favor of the government in this case (Pet. App. A45, A83-A84).[8]

---

tioners continue to urge against the original opinion of the court of appeals became moot when that decision was withdrawn.

[7] The "overwhelming authority" on which petitioners rely (Pet. 19) for the opposite proposition is inapposite. The cases that petitioners cite do not involve the rule of statutory interpretation that applies to exclusions from income.

[8] The court of appeals properly rejected the reliance that petitioners seek to place on the legislative history of Section 148 (Pet. 15). The court correctly observed that the legislative history is "unilluminating" and does not "help clarify whether Congress intended nonpurpose investments under § 148(f) to include ones that the bond issuer neither makes nor benefits from" (Pet. App. A47).

Petitioners' contention that the word "rebate" in Section 148(f) mandates the conclusion that the issuer must have actual possession of the arbitrage amount is also unsupported. As the court of appeals correctly stated (Pet. App. A45), common definitions of the word "rebate" reflect "that a rebater needn't always possess the rebated funds in the first place." The decision of *City of Columbus* v. *Commissioner*, 112 F.3d 1201 (D.C. Cir. 1997), which petitioners cite (Pet. 15-16), is inapposite. That case did not involve Section 148(f) and the

There is no conflict among the circuits nor other reason to warrant review by this Court of the application of this settled principle to the particular "complex provision of the Tax Code" (Pet. App. A50) involved in this case.

c. The contention of petitioner that the decision in this case has "ominous" implications for the municipal bond market (Pet. 19) lacks any foundation. This decision will not adversely affect legitimate municipal bond issues. It will, instead, benefit the bond market by providing incentive for issuers to maintain adequate controls over bond proceeds and thereby ensure that those proceeds are used for the intended public purpose rather than to reap unsanctioned arbitrage profits. As the court of appeals explained, the interpretation of the statute adopted in this case "will protect federal taxpayers from having to subsidize unapproved, non-governmental uses of tax-free state and municipal obligations" (Pet. App. A50).

2. Section 148 applies to bonds issued after December 31, 1985. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1314(d)(1), 100 Stat. 2664. Petitioners contend (Pet. 8-12) that Section 148(f) does not apply to this case because the bonds were "issued" for federal tax purposes on December 31, 1985, the day before the statute became effective. The Tax Court correctly found (Pet. App. A68-A69), however, that the purported closing of the bonds on December 31, 1985, was an obvious sham that should be disregarded for federal tax purposes. That finding was affirmed by the court of appeals (*id.* at A40-A41). That factual determination, concurred in by both courts below,

---

court in *City of Columbus* neither considered nor addressed the questions presented in this case.

does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

The Tax Court was amply justified in concluding that the purported closing was a sham. The date that a bond is issued is the date on which the evidence of indebtedness is exchanged for the issue price. See 26 C.F.R. 1.103-13(b)(6) (1979); 26 C.F.R. 1.150-1(c)(2) (1992). As the Tax Court found, the record of this case reflects that the putative purchaser of the bonds lacked even a meaningful portion of the funds required to purchase the bonds on the scheduled closing date and, with the acquiescence of the other parties, presented worthless share drafts drawn on "starter kit" forms from nonexistent accounts as "payment" for the bonds. The record also shows that the bogus share drafts were never placed into the banking channels and were instead passed in circular fashion among the parties to return to the hands of the underwriter (Pet. App. A59-A60). At the conclusion of the purported "closing," the issuers had plainly not received bona fide payment for the bonds.

In these circumstances, the Tax Court properly determined that the "closing" was a sham that must be disregarded for tax purposes. As this Court has frequently emphasized, the incidence of taxation is determined by the substance, not the form, of the transaction. See, *e.g.*, *Commissioner* v. *Tower*, 327 U.S. 280, 291 (1946); *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334 (1945). The court of appeals followed that established rule in this case (Pet. App. A39).

Petitioner asserts that the mere existence of tax-avoidance motives does not make the transaction a sham (Pet. 11-12, citing *Frank Lyon Co.* v. *United*

States, 435 U.S. 561 (1978)).[9] But it was not the mere existence of tax-avoidance motives on which the courts below relied: it was the entire, convoluted scheme of circular flows of meaningless checks drawn on "starter kits" for nonexistent accounts that revealed that the transactions at issue in this case were a sham. Petitioners have not cited any case suggesting that a party may receive tax benefits simply by distributing worthless checks as part of a circular transaction. Indeed, this Court in *Frank Lyon Co.* emphasized that it would not "condon[e] manipulation by a taxpayer through arbitrary labels and dealings that have no economic significance." 435 U.S. at 583. As the court of appeals explained, there is ample and consistent precedent for the proposition that a taxpayer "may not receive tax benefits based on checking arrangements that lack economic substance" (Pet. App. A38-A39, citing cases).

---

[9] The case that petitoners cite did not concern whether a worthless check should be treated as if it were a substantive transaction for tax purposes. The issue before the Court in *Frank Lyon Co.* was the validity for federal tax purposes of a sale-leaseback arrangement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
RICHARD FARBER
EDWARD T. PERELMUTER
Attorneys

JANUARY 1998